NO. 14,978

In the United States Court of Appeals for the Ninth Circuit

THE GRAY LINE COMPANY, a corporation,

Appellant

v.

R. C. GRANQUIST, District Director of Internal Revenue,

Appellee

On Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF FOR THE APPELLEE

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
A. F. PRESCOTT,
KARL SCHMEIDLER,
Attorneys,
Department of Justice,
Washington 25, D. C.

C. E. LUCKEY,
United States Attorney.
VICTOR E. HARR,
Assistant United States Attorney.

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OPINION BELOW

The District Court's opinion (R. 32-34), findings of fact and conclusions of law (R.42-51) are not officially reported.

JURISDICTION

This appeal involves federal transportation taxes for the month of July, 1950. The taxes in dispute, in the amount of $330.65, plus a 100 per cent penalty of $330.65 and interest of $47.21, or a total of $708.51, were paid on March 31, 1953. (R. 43.) Claim for refund was filed on April 17, 1953, and was rejected on January 12, 1954. (R. 6-19, 24.) Within the time provided in Section 3772 of the Internal Rev-

enue Code of 1939, and on June 10, 1954, the appellant brought an action in the District Court for the recovery of taxes paid. (R. 3-19.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1340. The judgment was entered on October 21, 1955. (R. 51-52.) Within sixty days and on November 7, 1955, a notice of appeal was filed. (R. 52.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the District Court correctly held that appellant's motor vehicles were "operated on an established line" within the meaning of Section 3469(a) of the 1939 Code, and that the fares collected by appellant were subject to the federal transportation tax.

2. Whether the District Court correctly held that appellant failed to establish, under Section 3471(a) of the 1939 Code, that it bore the burden of the federal transportation taxes.

3. Whether the District Court correctly held that appellant was liable for the penalty under Section 1718 of the 1939 Code for failing to pay the tax to the Government after having been advised in writing by the Internal Revenue Service that it should pay the tax.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 1718. PENALTIES.

* * *

(c) Any person who willfully fails to pay, collect, or truthfully account for and pay over, any tax imposed by this chapter, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. No penalty shall be assessed under this subsection for any offense for which a penalty may be assessed under authority of section 3612.

* * *

(26 U.S.C. 1952 ed., Sec. 1718.)

CHAPTER 30 — TRANSPORTATION AND COMMUNICATION

* * *

SUBCHAPTER C — TRANSPORTATION OF PERSONS

SEC. 3469 [As added by Sec. 554(b), Revenue Act of 1941, c. 412, 55 Stat. 687]. TAX ON TRANSPORTATION OF PERSONS, ETC.

(a) *Transportation.*—There shall be imposed upon the amount paid within the United States, on or after October 10, 1941, for the transportation, on or after such effective date, of persons by rail, motor vehicle, water, or air, within or without the United States, a tax

equal to 15 per centum[1] of the amount so paid. Such tax shall apply to transportation by motor vehicles having a passenger seating capacity of less than ten adult passengers, including the driver, only when such vehicle is operated on an established line.

* * *

(26 U.S.C. 1952 ed., Sec. 3469.)

SEC. 3471 [As amended by Sec. 554(d) (2) of the Revenue Act of 1941, *supra,* and Sec. 620(b) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. REFUNDS AND CREDITS.

(a) Credit or refund of any overpayment of tax imposed by subchapter B, subchapter C, or subchapter E may be allowed to the person who collected the tax and paid it to the United States if such person establishes, to the satisfaction of the Commissioner under such regulations as the Commissioner with the approval of the Secretary may prescribe, that he has repaid the amount of such tax to the person from whom he collected it, or obtained the consent of such person to the allowance of such credit or refund.

(b) Any person entitled to refund of tax under this chapter paid, or collected and paid, to the United States by him may take credit therefor against taxes due upon any monthly return.

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[1] The rate was increased to 15 per cent by Section 1650 of the Internal Revenue Code of 1939 which was added by Section 210 of the Revenue Act of 1940, c. 419, 54 Stat. 516, and amended by Section 302, Revenue Act of 1943, c. 63, 58 Stat. 21.

(c) Any person making a refund of any payment on which tax under subchapter B, subchapter C, or subchapter E has been collected, may repay therewith the amount of tax collected on such payment, and the amount of tax so repaid may be credited against the tax under any subsequent return.

(26 U.S.C. 1952 ed., Sec. 3471.)

SEC. 3473. APPLICABILITY OF ADMINISTRATIVE PROVISIONS.

All provisions of law (including penalties) applicable in respect of the taxes imposed by section 1700, shall, in so far as applicable and not inconsistent with this chapter, be applicable in respect of the taxes imposed by this chapter.

(26 U.S.C. 1952 ed., Sec. 3473.)

Treasury Regulations 42 (1942 ed.):

Sec. 130.58. *Motor Vehicles with Seating Capacity of Less Than* 10.—No tax is imposed on transportation by a motor vehicle having a seating capacity of less than 10 adult passengers, including the driver, unless such vehicle is operated on an established line. The term "operated on an established line" means operated with some degree of regularity between definite points. It does not necessarily mean that strict regularity of schedule is maintained; that the full run is always made; that a particular route is followed; or that intermediate stops are restricted. The term implies that the person rendering the service maintains and exercises control over the direction, route, time, number of passengers carried, etc. It implies also that the primary contract between

the operator and the person served is for the transportation of the person and not for the hire or use of the vehicle.

STATEMENT

The relevant facts, as found by the District Court (R. 42-50), may be summarized as follows:

Appellant is a corporation organized under the laws of the State of Oregon with its principal office located in Portland. During July, 1950, it was engaged in the business of transporting passengers by motor vehicle. One of its activities was that of providing and operating a limousine service for airline passengers and employees. (R.43-44.)

In August, 1949, appellant and Northwest Airlines entered into an agreement whereby appellant agreed to provide transportation by limousine for Northwest's passengers to and from Portland Airport and the City of Portland, and whenever circumstances were such that Northwest's regularly scheduled flights would originate or terminate at Troutdale Field, to provide limousine service between Troutdale Field and the City of Portland. Appellant provided similar transportation service for passengers and employees of Western Airlines and Pan American World Airways. (R. 44.)

During July, 1950, this service was provided by a fleet of six seven-passenger limousines. On none of the trips when limousines were used were more than seven adult passengers

carried. One trip during July, 1950, was made by a bus owned by appellant having a seating capacity of more than ten passengers. (R.44-45.)

The airline companies did not sell or issue tickets good for flights on their airplanes which were also good for transportation to and from the airports in appellant's limousines. The airline companies published schedules which showed fares at various cities, including Portland, but not times for limousine service. (R. 45.)

Limousine service for airline patrons was provided in the following manner:

When airline passengers purchased tickets for a scheduled flight, they were asked by employees of the airlines whether they desired limousine service or whether they would use their own transportation. Where passengers desired limousine service, arrangements were made as to where they would be picked up. This was at the offices of the airlines or at a hotel, usually the Old Heathman, Multnomah or Benson. Passengers were also advised of the time when and where in the downtown area the limousine would depart. Appellant did not determine the pick-up points in the downtown area. The airline companies established them at points convenient to their passengers. Appellant did not pick up passengers other than at designated points or along the route followed between the designated points or between the downtown area of Portland and the airport. (R. 45.)

Passengers being brought from the airport were delivered at any place or places other than those designated in the Portland downtown area, provided such place or places were in the general direction between the designated points, or at any place on the East side of Portland, between the airport and downtown Portland. In the latter instance the limousine would leave the street on which it was traveling to deliver the passenger at the place designated by the passenger, if such place were in the general direction of downtown Portland. (R. 46.)

During July, 1950, appellant did not employ a dispatcher. During that month it employed four regular drivers and an extra driver. The drivers worked in shifts and took turns in transporting passengers to and from the airport. Sometimes there would be two and occasionally three drivers on duty at the same time. The limousine driver whose turn it was to make the next trip would telephone to the airline company to ascertain the names of the passengers he was to take to the airport, the places where they were to get the limousine, and the take-off time of the airplane. He would then drive to the designated places, pick up the passengers and proceed to the airport. (R. 46.)

After he unloaded the passengers at the airport, the limousine driver would ascertain from the airline when the next plane was due to arrive, and if the airplane was due within a reasonable time and if there appeared to be passengers aboard the plane who desired or might desire trans-

portation from the airport, the driver would wait until the airplane arrived and was unloaded. He would then transport from the airport any passengers who desired limousine service. If, upon talking with the airlines, it appeared that no airplanes were to arrive within a reasonable time carrying passengers who desired or might desire limousine service from the airport, the driver would return directly to appellant's garage without first going to the downtown area with an empty vehicle. However, appellant tried to avoid deadheading, and drivers would wait at the airport as much as two hours for the arrival of airplanes carrying passengers who might desire limousine service. If there was no limousine at the airport which could meet an incoming airplane and no limousine would arrive there with passengers in time to meet the incoming airplane, appellant would send a limousine to the airport to meet the incoming airplane, provided there were passengers on such aircraft who desired or might desire limousine service. (R. 46-47.)

A limousine was not driven to the airport unless there were passengers to carry there or unless there were arriving passengers who desired or might desire service. As a result, there were times when airplanes would arrive or leave the airport without the limousines making any trips to the airport. (R. 47.)

The airport is approximately ten miles from the downtown district of Portland, which was the distance travelled

one way by appellant's limousines in all but a few instances. (R. 48.)

Appellant's limousines are operated under permit from the Public Utilities Commissioner of Oregon, as provided in the Motor Transportation Code of the State of Oregon (Chapter 488, Oregon Laws, 1949, and Chapter 467, Oregon Laws, 1947). (R. 48.)

Appellant did not instruct or direct its drivers as to the route over which its limousines were to travel between the downtown area of Portland and the airport. The particular route selected by a driver was always in the general direction of the downtown area of Portland or the airport. Weather and traffic conditions prevailing on a particular trip were factors considered by a driver in selecting particular streets. Appellant did not publish, post or print any schedules of its service. No public authority specified the route to be followed by appellant between the downtown area of Portland and the airport. (R. 48-49.)

Approximately 25 per cent of the airline passengers used limousine service and approximately 10 per cent of all flights were postponed by the airlines due to weather conditions or other causes. (R. 48.)

Appellant's one-way charge for transportation to and from the airport was increased from eighty-five cents to one dollar for airline passengers by agreement with Northwest Airlines, dated August 21, 1949. The price charged by ap-

pellant in July, 1950, was one dollar for passengers and sixty cents for airline company employees. The price charged by appellant during July, 1950, was the same whether service was provided by bus (admittedly not exempt from the transportation tax), or by limousine. The limousine drivers collected these amounts in cash from the passengers, except that the charges for the trips of airline crews based in cities other than Portland were billed to the airlines monthly. The drivers made a waybill for each trip or round trip and turned these in daily to appellant, together with all cash collected by them. (R. 48, 49.)

After reviewing appellant's limousine service, the Deputy Commissioner of Internal Revenue, by letter dated June 30, 1948, advised appellant that it was subject to the transportation tax. (R. 49.)

The District Court found that the fares collected by appellant for the transportation of airline passengers and employees between the downtown areas of Portland and the airport included the transportation tax, that the transportation tax paid by appellants to the Government was from amounts collected from its airline passengers and employees transported during July, 1950, that the burden of the tax was not borne by appellant, and that appellant's books and records did not reflect the collection of transportation tax from its passengers or as a tax obligation, although appellant did carry on its books and records an account showing tax liability for other transportation furnished by appellant, which

transportation was not by limousine and was subject to tax. The District Court found that amounts assessed against appellant as penalty under Section 1718(c) of the 1939 Code were paid by appellant and were not collected from its passengers. (R. 49-50.)

The District Court found that the limousine service provided by appellant was not irregular, but was operated with a degree of regularity between definite and fixed points, and was irregular only to the extent that inclement weather and other conditions postponed or cancelled air travel. (R. 50.)

The District Court concluded that during July, 1950, appellant operated its limousines on an established line within the meaning of Section 3469 of the 1939 Code, that the Commissioner's assessment and collection of the taxes, penalty and interest was proper, and the fares charged by appellant included the tax, so that appellant had not established that it bore the burden of the tax, as required by Section 3471 of the 1939 Code. (R. 50-51.)

SUMMARY OF ARGUMENT

1. As used in the statutes taxing the transportation of persons by motor vehicles, an "established line" has consistently been construed by the applicable Treasury Regulations to mean a regularity of operations of motor vehicles between definite points. During the periods that this statutory term has appeared in the revenue laws, Congress has on several

occasions reenacted or amended the transportation tax laws without disturbing this definition, and has thereby expressed its approval of the Regulations and given them the force of law.

The question of whether appellant's limousines were in fact operated on an established line was fully litigated below and determined adversely to appellant. Furthermore, the decision of the District Court below is fully in accord with the decision of the District Court in *Royce* v. *Squire,* 73 F. Supp. 510 (W.D. Wash.), affirmed on other grounds, 168 F.2d 250 (C.A. 9th), which involved similar facts.

The District Court found that there was no merit to the appellant's contention that the service which it furnished was either irregular or not at fixed points. That its service was supplemental to the air service, and was irregular only to the extent that inclement weather and other conditions postponed or cancelled air travel. The company, and not the passengers, determined the pick-up points and the routes between such pick-up points and the airport. This is fully supported by the evidence. For example, of almost 800 trips made during the month (July, 1950), all but four were clocked at within one mile of the ten-mile run that the drivers testified was the distance between the airport and downtown Portland with no intermediate stops.

2. In order to qualify for a refund of transportation taxes under Section 3471(a) of the 1939 Code, a claimant

must establish that it bore the burden of the tax. The undisputed facts of this case show, and the District Court found, that during July, 1950, appellant charged the same price to its passengers for transportation by bus (admittedly not exempt from the transportation tax) that it charged its limousine passengers. Appellant introduced no evidence as to why, in such circumstances, it bore the burden of the tax, and the District Court was justified in finding that the tax was "passed on," though it was only necessary for the court to conclude that appellant had not shown that it bore the burden of the tax.

3. Section 1718(c) of the 1939 Code provides, among other things, that a person who wilfully fails to pay over any tax imposed by the chapter, as well as the tax on the transportation of persons, shall be liable to a penalty in the amount of the tax which was not paid to the Government. In the present case, where appellant had been notified by letter from the Deputy Commissioner of Internal Revenue that it should remit the transportation tax on charges made by it for transporting passengers by limousine between Portland and the airport, and where the District Court in *Royce* v. *Squire,* 73 F. Supp. 510 (W.D. Wash.) (affirmed on the ground that the tax was passed on), previously had held that appellant's limousine operations carried on in Seattle, which were similar to those of the present case, were subject to the transportation tax, appellant's failure to pay the tax strongly evidences a wilful act, i.e., an intentional action

taken without any reasonable cause. Consequently, the District Court was clearly correct in holding that the Commissioner's assessment of the penalty was proper.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY CONCLUDED THAT APPELLANT'S VEHICLES WERE OPERATING ON AN ESTABLISHED LINE, AND THAT ITS FARES WERE SUBJECT TO THE TRANSPORTATION TAX UNDER SECTION 3469(a) OF THE 1939 CODE

Section 3469(a) of the 1939 code, *supra,* imposes a tax upon amounts paid within the United States for the transportation of persons by rail, motor vehicle, water or air. During July, 1950, the taxable period in the present case, the tax rate was 15 per cent. However, with respect to transportation by motor vehicles having a seating capacity of less than ten adult persons, the tax is applicable only if the vehicles are "operated on an established line." We submit that the District Court's decision, that the vehicles involved here were so operated, is fully supported by the facts, by the applicable Treasury Regulations and by the decision of *Royce* v. *Squire,* 73 F. Supp. 510 (W.D. Wash.) affirmed by this Court on other grounds, 168 F.2d 250.

Although Section 3469(a) does not define the term "operated on an established line," this term is defined by Section 130.58 of Treasury Regulations 42 (1942 ed.), *supra,* as follows:

> The term "operated on an established line" means operated with some degree of regularity between definite points. It does not necessarily mean that strict regularity of schedule is maintained; that the full run is always made; that a particular route is followed; or that intermediate stops are restricted. The term implies that the person rendering the service maintains and exercises control over the direction, route, time, number of passengers carried, etc. It implies also that the primary contract between the operator and the person served is for the transportation of the person and not for the hire or use of the vehicle.

The undisputed facts clearly support the District Court's conclusion (R. 50) that appellant's limousines were operated on an established line during July, 1950, as that term is defined by the Regulations. The testimony of appellant's own witnesses and the exhibits reveal a high degree of regularity of operations between definite points — the downtown area of Portland and the airport. For example, appellant's limousines were operated with regularity to conform with the scheduled operations of the airlines serviced by appellant, so that they met all outbound and inbound flights when passengers either desired or were thought to desire limousine service. (R. 70.) Furthermore, the large number of trips

made by appellant between downtown Portland and the airport during that one month, 800 trips, clearly shows that appellant's service was regular. (R. 33, Exs. 2, 3, 4.) Appellant's operations were between definite points, Portland International Airport on the one hand and the downtown area of Portland on the other. (R. 76-77.) Although the drivers could select the route to be taken, and the routes varied according to weather and traffic conditions, drivers generally selected the most convenient and direct route, and practically all of the limousine trips were ten miles in length. (R. 71, 75-76, 83, 86-87, 89.) Outgoing passengers were picked up only at a limited number of places, the airline offices and three hotels, and were carried directly to the airport, whereas incoming passengers were transported from the airport to the downtown area with discharge privileges only along the general route toward downtown and within the downtown area. (R. 70-72, 75, 76-77.)

The facts also show that appellant, and not the airlines, exercised control over the limousines. Although the limousines were not dispatched on a trip without first receiving information from the airlines of the arrival or departure of passengers on scheduled flights, the testimony conclusively establishes that appellant was an independent contractor and that appellant's drivers alone could dispatch its limousines. Appellant's drivers selected the route between downtown Portland and the airport. (R. 71, 75-76.) Traffic being the main factor, and weather another. (R. 87.) Although

the airlines notified appellant's drivers of the number of passengers to be picked up, the places where they were to be picked up, and the time at which the airplane was scheduled to depart, it appears that the limousine drivers controlled the time they picked up the passengers and the route to be travelled in order to deliver the passengers to the airport in time to make the flight. (R. 45, 86.) As to inbound passengers, the drivers controlled the route to be taken and limited the discharge points to areas contiguous to the route of the limousine between the airport and downtown Portland, and to a defined area within downtown Portland. (R. 76-77.) Furthermore, appellant clearly controlled the movements of its limousines, in that where a limousine would arrive at the airport and no plane was due to arrive within a reasonable time, appellant would decide whether to keep a limousine at the airport to await the plane's arrival, or to return the empty limousine to its garage and later send another limousine to the airport. (R. 25-26.) The airlines did not sell tickets good for transportation to or from airports in appellant's limousines. The airline schedules showed fares but not times for limousine service. (R. 45.) Finally, it is undisputed that the contract between appellant and the airlines was for appellant's transportation of passengers, and not for the hire or use of the limousines by the airlines. (R. 101-102.)

Hence, it appears that in the conduct of its limousine service, appellant operated its limousines with regularity be-

tween definite points, and it maintained and exercised control over the direction and route adopted, schedules, and number of passengers carried. It was, therefore, engaged in the operation of "an established line" within the meaning of the applicable statute and Regulations.

Appellant, however, challenges the validity of Section 130.58 of Treasury Regulations 42 on several grounds. It contends, *inter alia,* that the word "established" as used in the statute connotes the creation or approval by a Governmental authority and that therefore the phrase "operated on an established line" must mean regular operation over a route fixed by some regulatory Government agency. (Br. 37-41.) It further contends that the Regulations have improperly broadened the requirement of regularity of operation by providing that strict regularity of schedule need not be maintained, nor a fixed route followed or intermediate stops restricted. (Br. 36-37, 42.)

We submit that appellant's contentions are not valid for the following reasons. For example, it should be noted that as used in the Regulations the word "established" means permanent recurring, or regular as opposed to sporadic or casual. This is a commonly accepted meaning of the term, and this meaning has been applied in various connections. See *Wells Lamont Corp.* v. *Bowles,* 149 F.2d 364, 366 (Em. App.). Furthermore, it has been held that the term "line" includes the operation under one management of a series of

public conveyances passing between places with regularity. *Bruce Transfer Co.* v. *Johnston,* 227 Iowa 50, 53, 287 N.W. 278, 280; *Regenhardt Const. Co.* v. *Southern Ry.,* 297 Ky. 840, 846, 181 S.W. 2d 441, 444; *Tuggle* v. *Parker,* 159 Kan. 572, 574, 156 P.2d 533, 534. As we have seen, appellant's limousines, in making some 800 trips between downtown Portland and the airport during July, 1950, made recurring trips between two places, and, therefore, operated on an "established line" within the generally accepted meaning of this term. Therefore, even if it be assumed that the interpretation contended for by appellant is a permissible one, which we deny, nevertheless appellant's interpretation must yield to that adopted by the Commissioner, for it is well established that where there is doubt as to the construction of a statute, the contemporaneous interpretation of the law by the department charged with its enforcement is generally held to be controlling where not arbitrary or unreasonable (*Brewster* v. *Gage,* 280 U.S. 327, 336-337; *Maryland Casualty Co.* v. *United States,* 251 U.S. 342, 349), and, as we have shown, Section 130.58 of Treasury Regulations 42 (1942 ed.) is not an arbitrary or unreasonable interpretation of Section 3469 of the 1939 Code.

The lack of merit in appellant's challenge of the validity of this provision of the Regulation is also apparent from the fact that the Regulations' interpretation of the term "operated on an established line" has continued without material change ever since this language first appeared in the trans-

portation tax statutes. Consequently, it must now be considered as having received Congressional approval and to have the force and effect of law.

The tax on transportation of persons by motor vehicle first appeared in the Revenue Act of 1917, c. 63, 40 Stat. 300. Section 500 of that Act provided, in material part, as follows:

> Sec. 500. That from and after the first day of November, nineteen hundred and seventeen, there shall be levied, assessed, collected, and paid * * * (c) a tax equivalent to eight per centum of the amount paid for the transportation of persons * * * by any form of mechanical motor power on a regular established line when in competition with carriers by rail or water, * * *

The Act did not define the term "regular established line" and so far as can be determined, no administrative interpretations of that language were issued under the 1917 statute. The transportation tax was reenacted in substantially identical terms in Section 500 of the Revenue Act of 1918, c. 18, 40 Stat. 1057. Following passage of the 1918 statute, the Commissioner promulgated Treasury Regulations 49 (1919 ed.), relating to the collection of tax on transportation and other facilities. So far as relevant here, these Regulations provided as follows:

> Art. 39. *Regular established line.*—The phrase "a regular established line" as used in section 500, subdivision (c), is held to mean a regularity of operation

> of transportation facilities by motor power between definite points. If such motor transportation is furnished with regularity between points which are connected by rail or water routes, it is not necessary that the automobile or motor transportation pursue a specified route of travel. The regularity of operation of the motor transportation is the essential element of "a regular established line."

The tax on transportation was repealed as of January 1, 1922, by Section 1400 of the Revenue Act of 1921, c. 136, 42 Stat. 227. In the meantime, however, the regulatory provisions quoted above were presumably accepted as the correct interpretation of the law and applied by the Commissioner in administering the statute.

Following repeal of the transportation tax effective in 1922, no further attempt was made to tax the transportation of persons by motor vehicle until Section 3469 was added in 1941 to the Internal Revenue Code of 1939. While this provision is of broader application than its predecessors and differed somewhat in its terms from the former statutes, nevertheless it retained the language of the earlier Acts with respect to the operation of motor vehicles on an "established line."

Accordingly, when Treasury Regulations 42 were promulgated in 1942, the Commissioner adopted, without material changes, the definition of "established line" which was embodied in the earlier Regulations. The legislative approval

of the former Regulations, by reenactment of the statutory provision to which they relate, clearly gives such Regulations the force of law. *Wilmette Park Dist.* v. *Campbell,* 338 U.S. 411, 417-418; *Crane* v. *Commissioner,* 331 U.S. 1, 7-8; *Helvering* v. *Reynolds Co.,* 306 U.S. 110, 114-115; *Helvering* v. *Winmill,* 305 U.S. 79, 82-83.

Moreover, since 1941, Section 3469 of the 1939 Code has been changed both as to rates and as to substance.[2] The regulatory provisions have remained substantially unchanged during the periods in which the transportation tax on persons has been in effect, and during that time Congress has repeatedly reenacted without change the provisions of this section upon which the Regulations have been based. This action, taken with knowledge of the construction placed upon the statute by the Commissioner, requires the conclusion that the Commissioner's interpretation has not been inconsistent with the intent of the statute (*Mass. Mutual Life Ins. Co.* v. *United States,* 288 U.S. 269) and gives to the Regulations the effect of law (*Crane* v. *Commissioner, supra; Helvering* v. *Reynolds Co., supra*).

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[2] Section 609 of the Revenue Act of 1942, c. 619, 56 Stat. 798; Section 302(a) of the Revenue Act of 1943, c. 63, 58 Stat. 21; Section 2, Joint Resolution of March 31, 1949, c. 46, 63 Stat. 30; Section 607 of the Revenue Act of 1950, c. 994, 64 Stat. 906; Section 494 of the Revenue Act of 1951, c. 521, 65 Stat. 452; Section 504(a) of the Excise Tax Reduction Act of 1954, c. 126, 68 Stat. 37.

Appellant's contention, that it was not authorized under the laws of Oregon to operate on "an established line" unless it had a permit to do so issued by the Public Utilities Commissioner of Oregon (Br. 38-41), lacks merit. In the first place, the record reveals only that appellant's limousines were operated under permit from the Public Utilities Commissioner of Oregon as provided in the Motor Transportation Code of the State of Oregon (Chapter 488, Oregon Laws, 1949, and Chapter 467, Oregon Laws, 1947). (R. 26, 48.) There is nothing in the record to support appellant's contention that it could operate only as an irregular route carrier under the Oregon statute. (Br. 41.) In any event, even were appellant permitted only to transport persons over irregular routes as that term is used in the Oregon law, this would not determine the tax consequences as to whether appellant "operated on an established line" in accordance with the Internal Revenue Code and the Treasury Regulations, particularly where, as here, the purposes and coverage of the state and federal statutes differ. See *Old Colony R. Co.* v. *Commissioner,* 284 U.S. 552, 562; *Kansas City Southern Ry. Co.* v. *Commissioner,* 52 F. 2d 372, 378 (C.A. 8th), certiorari denied, 284 U.S. 676; *Mine Hill & Schuylkill Haven R. Co.* v. *Smith,* 184 F.2d 422, 427 (C.A. 3d), certiorari denied, 340 U.S. 932.

As we have pointed out, *supra,* the material facts of this case are very similar to those of *Royce* v. *Squire,* 73 F. Supp. 510 (W.D. Wash.), affirmed by this Court on another

ground, 168 F.2d 250. For example, in both cases the passengers were picked up only at certain designated places. In both cases the drivers were free to select the route to the airport. Furthermore, as in *Royce,* there appears to be sufficient regularity of operation and control over such operation exercised by appellant in the present case to constitute its movements as an operation "on an established line."

Appellant does not contend that *Royce* v. *Squire* was wrongly decided by the District Court in Washington. Instead, it attempts to distinguish the present case from *Royce.* We submit that such differences as are noted by appellant (Br. 25-28) are not material, and that in all pertinent respects these cases are indistinguishable. For example, appellant's contention that it did not have a dispatcher in its Portland office is immaterial, since its drivers acted as dispatchers and controlled the movements of the limousines as effectively as the dispatcher did in *Royce.* Also, the fact that in Seattle appellant's limousines met all incoming planes, or that in Seattle 50 per cent of the passengers desired limousine service, whereas in Portland appellant's limousines met only those flights where passengers either desired limousine service, or were believed to desire such service, and that only 25 per cent of Portland passengers desired limousine service, does not affect the regularity of appellant's operation. Neither does there appear to be any material differences between *Royce* and the present case as to the routes taken by the drivers. In both cases the company, and not the airlines, con-

trolled the routes, since the drivers were permitted to select the particular streets to follow in view of traffic conditions. Although the Seattle drivers were instructed to follow the most direct route, this is not materially different from what occurred in Portland where the drivers also selected the best routes, and, with one exception, all of the 800 Portland trips were approximately ten miles in length. Nor can the cases be distinguished on the ground that in Seattle the drivers discharged their passengers only in the downtown area, whereas in Portland the drivers discharged passengers along the route from the airport to downtown Portland, since in both cases the limousines were primarily carrying passengers to a limited area of each city. Finally, the fact that the airline companies advised appellant of the places where it should pick up passengers does not detract from the effective control maintained by the Gray Line Company over the movement, routes, etc., of its limousines in both cities. Thus, it appears clear that the material facts of *Royce* and the present case are substantially the same, and the District Court was clearly correct in the present case in holding that appellant "operated on an established line." It also appears clear, after reviewing the facts in the present case, that the District Court's findings of fact were correct and were not erroneous, as contended by appellant. (Br. 29-32.)

Appellant places great reliance upon the conclusion reached by the Internal Revenue Service in Rev. Rul. 54-47,

1954-1 Cum. Bull. 269, that certain limousine services are exempt from the transportation tax. (Br. 47-48.) It should be noted, however, that the facts underlying this ruling are that passengers are picked up or delivered at any place or places designated by them, as distinguished from fixed pick-up and discharge points as existed in the present case. Consequently, in the situation set forth in the ruling, the limousine company could not exercise any control over the direction, route, etc., taken by its limousines, in contrast to the situation which occurred in the present case. Therefore, it is clear that this ruling is not applicable to the facts of the present case.

II

THE DISTRICT COURT WAS CORRECT IN FINDING THAT APPELLANT HAD NOT ESTABLISHED THAT IT HAD BORNE THE BURDEN OF THE TAXES, WHICH IS A PREREQUISITE TO ANY RECOVERY BY IT

Under Section 3471(a) of the Internal Revenue Code of 1939, *supra,* in order to obtain a refund of transportation taxes, appellant must establish not only that the tax was erroneously collected, but also that it bore the burden of the

tax.[3] *Royce* v. *Squire,* 168 F.2d 250 (C.A. 9th); *United States* v. *Walls* (C.A. 5th), decided April 12, 1956 (1956 C.C.H., par. 9446); *Sharp & Dohme* v. *United States,* 144 F.2d 456 (C.A. 3d). The reason for these statutory requirements is clear. If an operator has not borne the burden of the tax, to permit it to recover a refund would give it a windfall. *United States* v. *Jefferson Electric Co.,* 291 U.S. 386. As the Fifth Circuit recently held in *United States* v. *Walls, supra,* this presents a question of fact. In the present case the record is devoid of any convincing evidence to establish this fact. On the contrary, it is clear from the undisputed facts that appellant did not bear such burden.

It is undisputed that by letter dated June 30, 1948, D. S. Bliss, Deputy Commissioner of Internal Revenue, advised appellant that as a result of a field investigation, it was the opinion of the Revenue Service that appellant's limousines were operated on an established line within the meaning of Section 3469 of the 1939 Code, and that appellant immediately should begin to collect transportation taxes from its passengers. (R. 98-101.) The one-way charge then in effect, in accordance with a contract between appellant and the air-

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[3] Appellant might also recover if it shows that it refunded to its passengers the taxes which it had collected from them; or that it had obtained authority from such passengers to sue for a refund. But neither of these positions was asserted nor proved here.

lines, was eighty-five cents per passenger and sixty cents per airline employee. Following an agreement of August 21, 1949, between appellant and Northwest Airlines, appellant increased its fare to its passengers to one dollar, which fare was in effect during July, 1950.[4] (R. 48, 49.)

During July, 1950, appellant admitted that $4 of transportation taxes were properly assessed against it on one occasion when it provided bus service for twenty-four persons who were each charged a fare of one dollar. (R. 81-82.) Since the same one dollar charge was made for both limousine and bus travel during July, 1950, and appellant admitted that it included the tax in the amount collected from its bus passengers, in the absence of explanatory evidence the District Court was justified in finding that appellant likewise passed on the transportation taxes to its limousine passengers. Under such circumstances appellant has not shown that it bore the burden of the tax. *Royce* v. *Commissioner,* 168 F.2d 250 (C.A. 9th). Cf. *Coates* v. *Commissioner,* 161 F.2d 671 (C.A. 5th).

Appellant contends, however, that the decision of this Court in *Royce* is not controlling here because of certain alleged differences of fact. Appellant contends (Br. 50-54) that in *Royce* the fares were increased immediately after the tax rates were increased, the drivers notified their passengers

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[4] Appellant did not increase its sixty cent rate for airline employees after August 21, 1949. (R. 48.)

that the fares included the tax, and the fares and tax were segregated in the company's books, whereas in the present case appellant did not increase its rates for approximately one year after it received notification from the Revenue Service that it should collect and pay over the tax, its drivers did not advise their passengers that the fares included the tax, and appellant did not maintain any tax liability account in its books, but treated the entire amount received from its passengers as income. However, as the District Court below correctly pointed out (R. 34, 94), if, in fact appellant collected the tax from its passengers, when it charged the same amount for a non-exempt bus transportation as it did for its limousine service, it does not make any difference whether appellant did not regard part of the amount collected as including the tax, or did not advise its passengers of the collection of the tax, or maintain a tax liability account. *Cudahy Packing Co.* v. *United States,* 152 F.2d 831 (C.A. 7th), rehearing denied, 152 F.2d 836.

Upon examination of the entire record, it is clear that not only has appellant failed to make any showing that it bore the burden of the tax during July, 1950, but the undisputed facts clearly show that it collected the tax from its passengers.

III

THE DISTRICT COURT CORRECTLY HELD THAT THE COMMISSIONER'S ASSESSMENT AND COLLECTION OF THE PENALTY WAS PROPER

Section 1718(c) of the 1939 Code, *Supra,* provides, in part, that any person who wilfully fails to collect and pay over any tax imposed by the chapter, as well as the tax on the transportation of persons, shall, in addition to other penalties, be liable to a penalty in the amount of the tax which was not paid over to the Government. In accordance with this provision, the Commissioner, in January 31, 1953, in addition to assessing a deficiency in taxes against appellant in the amount of $330.65 for unpaid transportation taxes for July, 1950, also assessed a 100 per cent penalty against appellant, and interest. There is no question but that appellant did not pay any transportation taxes for July, 1950, until after the penalty and interest had been assessed against it. (R. 23.) Therefore, the only question which is involved here is whether appellant's prior failure to pay over these taxes was wilful, so that the penalty of Section 1718(c) was properly assessed.

The penalty imposed by this section is civil, not a criminal sanction, so that the term "wilfully," as used therein means "an act which is intentional, knowing, or voluntary, as distinguished from accidental" and one which was done "without reasonable cause," but it does not require that the act be

done with any bad purpose. *United States* v. *Murdock,* 290 U.S. 389, 394; *Kellems* v. *United States,* 97 F. Supp. 681 (Conn.).

In the present case it is clear that appellant's failure to pay over the transportation taxes for July, 1950, was intentional, without reasonable cause and was not the action of a reasonably prudent business concern. In the first place, appellant had been notified by letter dated June 30, 1948, by the Deputy Commissioner of the Internal Revenue that it should remit the transporation tax on charges made by it for transporting passengers by limousine between Portland and the airport. Furthermore, on June 16, 1947, the United States District Court for the Western District of Washington, in *Royce* v. *Squire, supra,* had held that appellant's limousine operations in Seattle, which were similar to those carried on in Portland, were subject to the transportation tax. In view of these facts, appellant cannot claim that its failure to pay the transportation taxes for July, 1950, was based upon reasonable cause.

Taxpayer contends (Br. 55-59) that its failure to pay over the tax was reasonable and not wilfull because it relied upon advice of counsel and upon advice of someone in the Collector's office in Portland that it was not required to pay the tax. In view of the letter sent to it by the Deputy Commissioner that it should pay the tax, as well as the District

Court's opinion in *Royce,* it is difficult to see how appellant could reasonably and prudently rely upon such advice without running a risk of having a penalty assessed against it.

CONCLUSION

The decision of the District Court is correct and should be affirmed by this Court.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
A. F. PRESCOTT,
KARL SCHMEIDLER,
Attorneys,
Department of Justice,
Washington 25, *D. C.*

C. E. LUCKEY,
United States Attorney.

VICTOR E. HARR,
Assistant United States Attorney.

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